

DoD Labor Relations Guidance
DoD Telework Policy
October 22, 2001

BACKGROUND:

Section 359 of Public Law No. 106-346, October 23, 2000, states:

“Each executive agency shall establish a policy under which **eligible employees** of the agency may participate in telecommuting to the maximum extent possible without diminished employee performance. Not later than 6 months after the date of the enactment of this Act, the Director of the Office of Personnel Management shall provide that the requirements of this section are applied to 25 percent of the Federal workforce, and to an additional 25 percent of such workforce each year thereafter.”

On October 22, 2001, the Under Secretary of Defense (Personnel and Readiness) issued the Department of Defense (DoD) Telework Policy implementing the requirements of the law. This policy provides that Components may develop their own guidance based on the Department’s overarching policy. Most notably, it defines broad criteria for determining the eligibility of employees and positions for teleworking (telecommuting).

QUESTIONS AND ANSWERS ON BARGAINING OBLIGATIONS:

1) Are these changes subject to bargaining with our union?

Yes, local bargaining obligations must be met. The Federal Labor Relations Authority (FLRA) has ruled that an agency may not make changes to a condition of employment without fulfilling its bargaining obligations. See 41 FLRA 850, 853. The new telework policy does impact the working conditions of bargaining unit employees and is subject to appropriate bargaining.

2) Since law requires this new policy, are we expected to implement this policy by a certain date?

While the goal is to implement this policy as soon as possible, the law does not set a specific target date for an organization at the level of exclusive recognition to implement the policy. It is important to note, however, that the law requires the Office of Personnel Management (OPM) to provide that the requirements of the law are applied to 25 percent of the **eligible** Federal workforce during the first year and an additional 25 percent of such workforce each year thereafter.

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DoD Telework Policy
October 22, 2001

The goal of the DoD policy is for each Component to offer the opportunity to telework to 25 percent of the eligible workforce in the Component (and each year

DoD Labor Relations Guidance

DoD Telework Policy

October 22, 2001

thereafter). Therefore, each individual base or installation within your Component has some flexibility in ensuring bargaining obligations are met prior to implementation at the base or installation level (i.e. 25% requirement is at component level, not base level).

3) What if teleworking is already covered by an existing agreement with our union and the union states it does not wish to negotiate over the new policy?

The Authority has ruled that once a collective bargaining agreement becomes effective, subsequently issued rules or regulations, with the exception of Government-wide rules or regulations issued under 5 USC § 2302 (related to prohibited personnel practices), cannot nullify the terms of such a collective bargaining agreement. See 9 FLRA 983. 5 USC 7116(a)(7) provides that it is an unfair labor practice for an agency to enforce any rule or regulation which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed. See 39 FLRA 120. Therefore, to the extent that an existing agreement conflicts with DoD policy on teleworking, the agreement will

DoD Labor Relations Guidance
DoD Telework Policy
October 22, 2001

prevail. At the time the agreement expires or is up for renegotiation, it would be appropriate to negotiate a new agreement that is consistent with the requirements of the DoD policy.

4) What can the union negotiate concerning the telework policy?

In one early (yet, still applicable) decision of the FLRA involving teleworking, the Authority considered a union proposal which set broad and non-exclusive criteria for the agency to consider when determining whether to permit employees to work from home. The Authority found the proposal to be a negotiable procedure because management was not restricted to the union's proposed criteria. See 1 FLRA 897, 901. The DoD policy does outline criteria for the Components to follow when determining the eligibility of employees and positions for telework. Therefore, when evaluating the negotiability of union proposals on the identification of positions, you should consider the impact on management's statutory rights such as the right to assign work and the right to determine internal security practices.

In another decision, the Authority ruled that the location at which employees perform the normal duties of their jobs is negotiable *unless a relationship exists between the job location and the job duties*. See 39 FLRA 1441, 1443. While this case did not involve a telework issue, it is a good indicator how the FLRA may look at union proposals related to the identification of employees and positions eligible to telework.

Other matters related to teleworking that your union may wish to negotiate include procedures to be utilized for performance appraisals, time and attendance monitoring, applicable grievance procedures, work schedules, overtime, equipment needs, security issues, and workers compensation. However, keep in mind that the goal of the policy is that such matters generally should be treated in the same manner as employees who do not telework. You may have existing contract language on these topics that are just as applicable for employees who telework as any other employee.

As with any union proposal, consideration must be given to management rights, other appropriate laws and regulations, and existing collective bargaining agreements when evaluating union proposals relating to telework. The Field Advisory Services (FAS) Labor Relations Team is available to provide negotiability

DoD Labor Relations Guidance

DoD Telework Policy

October 22, 2001

determinations on any union proposal you receive on teleworking. You may contact the FAS Labor Relations Team at (703) 696-6301, Team 3 or DSN 426-6301.